IN THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1977

NO. **76-1583**

MASOUD AHMADI and ALIREZA KHOJASTEH,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

J. TONY SERRA, ESQUIRE
SERRA, PERELSON & METCALF
473 Jackson Street
San Francisco, California
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March 16, 1977

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INDEX

INDEX (Continued)

CITATIONS

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The petitioners, MASOUD AHMADI and ALIREZA KHOJASTEH, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of

California, First Appellate District, Division Four, entered in this proceeding on October 25, 1976.

OPINION BELOW

The opinion of the said Court of Appeals, officially unpublished, appears in Appendix I hereto. No opinion was rendered by the Supreme Court of the State of California. Said Supreme Court denied Hearing herein; a copy of said denial, dated December 22, 1976, is attached hereto as Appendix II.

JURISDICTION

The judgment of the Court of Appeals for the First Appellate District of the State of California was entered on October 25, 1976, affirming the judgment of conviction of the Superior Court of the State of California, in

and for the City and County of San Francisco. A timely Petition for Hearing was filed on December 1, 1976, and denied on December 22, 1976. Thereafter, this Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

WHETHER THE SEIZURE OF CONTRABAND BY UNDERCOVER OFFICERS IN A MANNER WHICH IS TANTAMOUNT TO THEFT, CAN CONSTITUTE COMPETENT, ADMISSIBLE EVIDENCE, OR WHETHER NOT SUCH A SEIZURE VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

On July 31, 1975, the District Attorney for the City and County of San

Francisco filed an Information in the Superior Court of the State of California, in and for the City and County of San Francisco, Action Number 90640, charging petitioners with furnishing marijuana, a felony, amongst other drug felony offenses.

Pursuant to California Penal Code, Sections 995 and 1538.5, petitioners moved to have certain evidence suppressed, and the certain Count herein specified of the Information set aside, predicated on the issue herein raised. On August 25, 1975, the said Superior Court denied both Motions made by the petitioners.

After petitioners' Motion to Suppress Evidence was denied, the petitioners pled guilty to the sale of marijuana and to possession of marijuana,

respectively. All other Counts were dismissed by the District Attorney. The said Counts involved are ones wherein the charge was supported by marijuana seized by an undercover officer, which we claim was tantamount to theft.

Thereafter, and pursuant to California Penal Code, Section 1538.5, petitioners perfected their Appeal through the Appeal Court of the State of California, and petitioned the Supreme Court of California for Hearing.

Each petitioner is at liberty at this time. Petitioner AHMADI has been placed on three (3) years' probation, with the condition that he serve six (6) months in the County Jail. Petitioner AHMADI is free on appeal

bond at this time, with a Stay of his jail sentence until this matter is resolved by this Court.

A statement of the facts of this case is as follows: While undercover officers were investigating petitioners, in April and May of 1975, a social and business call was made by them to the petitioners' boutique in San Francisco. An informal verbal exchange resulted and the passing of a marijuana cigarette ensued. The officer simulated the inhalation of the same. The partially-burnt cigarette of marijuana was thereafter placed into an ashtray. Thereafter, the inspector, in his undercover capacity, without the knowledge or consent of petitioners, surreptitiously removed the partially-burnt marijuana cigarette from the ashtray, secreted it

upon his person, and removed it from the premises.

Petitioners were arrested weeks later. At the time of the seizure, the officers had neither arrest warrant, search warrant, or effectuated an arrest.

Later, at the Preliminary Hearing, said partially-burnt marijuana cigarette was introduced as evidence of furnishing marijuana on said occasion.

Said issue was immediately raised at said Preliminary Hearing. However, the Court at that time indicated that there was no "law which prohibits the theft of contraband."

REASONS FOR GRANTING THE WRIT

1. Contraband is a proper subject of larceny.

In State v. Donovan(1919) 107 Wash.276, 183 P.127, the Court held

although whiskey was outlawed (so that the Court would not afford relief to anyone making claim to property therein) it might be the subject of larceny.

In Osborne v. State, 115 Tenn.717, 92 S.W. 853, the Court said:

> It is also well settled that a chattel kept for an unlawful purpose, such as intoxicating liquors kept for sale in violation of law, or gambling paraphernalia, the possession of which is prohibited, may be the subject of larceny.

In Ellis v. Commonwealth, 186 Ky.494, 217 S.W. 368, the Court said that the:

> ... statute was designed to prevent and punish the unlawful taking of the property of another and it is not material whether the owner was prohibited from having it in his possession or denied the right to sell it.

The Court therein justified its ruling

thusly:

> It is a principle or rule of property as old as common law itself, that the possession of one is good against all others who cannot show a better right of possession. Hence he who steals a stolen article of property from a thief may himself be convicted, notwithstanding the criminality of the possession by his immediate predecessor in crime.

Further justification for this rule is found in State v. Schoonover (1922) 122 Wash.562, 211 P.756, wherein the Court stated that the law:

> ... is for the purpose of discouraging its possession, not for the purpose of encouraging larceny. Notwithstanding that the contraband liquor had no value in the open market, it had in fact a ready sale; ... and the mere fact that its sale would be in violation of the law

> did not excuse or justify its being unlawfully taken from its owner.

In California, in People v. Walker (1939) 33 Cal.App.2d 18, the Court stated:

> The doctrine that contraband property may be the subject of larceny has been adopted by all the jurisdictions passing upon that point.

In the latest California case, People v. Moreland (1970) 5 Cal.App.3d 588, 593 (85 Cal.Rptr. 215), the Court found that heroin could be the subject of theft:

> Defendants were acquitted of the more serious offense, Section 209 of the Penal Code, as well as of the burglary and attempted robbery charges, because of the trial court's belief that heroin could not be the subject of theft. This entirely erroneous notion was injected into the proceedings during the cross-examination ...

2. Theft of contraband, even of slight intrinsic value, is sufficient to support a charge of petit larceny.

There are two California cases which provide that contraband, even when deprived of its illegal "street" value, retains some slight intrinsic value which would support a charge of petit larceny. In People v. Leyvas (1946) 73 Cal.App.2d 863, 167 P.2d 770, the defendant stole gasoline ration coupons. The Court, in ruling that the coupons, as evidence of the permission granted by the Government to buy rationed commodities, have a tangible and intrinsic value subject to larceny, stated:

> Robbery does not depend upon the value of the property taken. The other elements being present, the crime is

made out even though the property taken is of slight value.

The case of People v. Caridis (1915) 29 Cal.App. 166, concerned the theft of an illegal lottery ticket. The Court refused to recognize its "street" value of $1,250.00 (a winner), but nevertheless held that:

> Considered as a mere piece of paper, the lottery ticket in question possessed perhaps some slight intrinsic value which, however small, would have sufficed to make the wrongful taking of it petit larceny.

3. Evidence forming the basis of the Count herein involved of the Information was illegally seized by the police, through conduct constituting petty theft, and is therefore inadmissible in a criminal prosecution, under

the Fourth Amendment to the United States Constitution.

The Court in People v. Cahan (1955) 44 Cal.2d 434, 282 P.2d 905, "resolutely set its face" against sanctioning the use of illegal activity by the Governmen: officials to secure conviction of alleged criminals:

> To declare that in the administration of the criminal law the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal ... breeds contempt for law and invites everyman to become a law unto himself.

On April 16, 1975, Inspector King, in an undercover capacity, took a partially-burnt cigarette, presumably of marijuana, from the premises of the Yamini Boutique

without petitioner owners' knowledge or permission. Contraband is a proper subject of theft, the amount of which is irrelevant (the amount here was sufficient to charge petitioners with possession in said Count of the said Information herein). The police may not commit a crime to prosecute a crime. The marijuana obtained as the result of an illegal seizure is inadmissible as evidence and should have been suppressed.

CONCLUSION

Herein is a case where an undercover narcotics officer surreptitiously removed marijuana from a subject under investigation. They have not an arrest warrant, search warrant, and do not arrest on the occasion of the removal. Many weeks later there is an arrest.

and the marijuana becomes evidence in the prosecution of the petitioners. A seizure such as this, which is tantamount to theft, cannot be countenanced by the Fourth Amendment criteria for reasonable seizures. To allow this case and precedent to stand, invites a plethora of potential police abuse in this area. It is obnoxious to common sense and Fair Play, and this Court should grant its Writ of Certiorari to review this incident, and correct a California State decision which will result in potential police abuse.

For all the reasons heretofore, Certiorari should be granted.

Respectfully submitted,

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March 16, 1977

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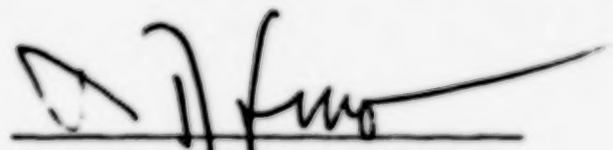
CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 1977, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530, Counsel for Respondent. I further certify that

all parties required to be served have been served.



J. TONY SERRA, ESQUIRE
Attorney for Petitioners

APPENDIX I

(The following is a typewritten reproduction of the Opinion of the California Court of Appeal)

"NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

vs.

Filed
Oct 25,1976

MASOUD AHMADI and
ALIREZA KHOJASTEH,

Defendants and Appellants.

1/Crim. 14996
1/Crim. 15163
(Superior Court
No. 90640)

THE COURT:*

Alireza Khojasteh pleaded guilty to possession of marijuana (Health & Saf. Code, § 11357) and Masoud Ahmadi pleaded guilty to selling marijuana (Health & Saf. Code, § 11360). Both were admitted to probation; the appeals are from the probation orders.

Appellants contend that Officer King was guilty of theft when he, still operating under cover, took marijuana from the ashtray and preserved it as evidence. This contention has no merit. An officer investigating crime can seize contraband exposed to his view, and produce it later in court as evidence. (Cf. People v. Munoz (1961) 198 Cal.App.2d 649.) Contrary to appellants' contention, such a seizure, for official purposes and not for private misappropriation of the contraband, is not theft. The court acted correctly in denying the motions to suppress evidence.

Affirmed."

*Before Caldecott, P.J., Rattigan, J., and Christian, J.

(Typewritten reproduction)

APPENDIX II

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

DEC 22 1976

I have this day filed Order

HEARING DENIED

In re: 1. Crim. No. 14996
15163

People

VS.

Ahmadi and Khojasteh

Respectfully,

G. E. BISHEL
Clerk